No. 16,059

IN THE

United States Court of Appeals

For the Ninth Circuit

LEE TIN MEW,
Appellant,

vs.

WILLIAM S. JONES, United States Immigration and Naturalization Service,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Misc. No. 737.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

On May 7, 1958 Appellee filed a verified petition for an order to compel the Appellant to appear and testify (R. 1-2). On May 8, 1958, the District Court ordered Appellant to appear and testify on May 15, 1958 (R. 3). On May 12, 1958, Appellant filed a motion to quash (R. 4), which was denied on May 14, 1958 (R. 21). Notice of appeal was filed by Appellant on May 14, 1958 appealing from the order of May 8, 1958. The order was a final appealable order. *U. S. v.*

Vivian (7 Cir. 1955), 217 F. (2d) 882, 883. Jurisdiction of this Court is predicated upon 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE.

On May 7, 1958 Appellee attempted to serve a subpoena on Appellant at his home (R. 32). However he was not there and later that day Appellant through his attorney, W. Y. Char, called and asked why the Appellee wished to see Appellant (R. 32). At the request of Appellant and his attorney, who presented himself voluntarily at Appellee's office, a subpoena was served and testimony was taken on May 7, 1958 (R. 32). The Appellant was sworn and answered only a few questions concerning his name and thereafter refused to answer any and all questions asked him by Appellee (R. 23-28) (Pltf's Exhibit I). The Appellant refused to answer the questions on the grounds of *Minker v. U. S.,* 350 U.S. 179 (R. 25). As a result of this refusal Appellee applied for (R. 1-2) and obtained an order from the United States District Court ordering Appellant to appear and testify before Appellee (R. 3). Thereafter Appellant filed a motion to quash the order, together with an attached affidavit (R. 4-5). The motion to quash was denied (R. 21).

QUESTION PRESENTED.

May Appellant, a person an Immigration officer suspects of being an alien, refuse to answer questions

concerning his status and the status of some of his alleged relatives on the grounds of *Minker v. U.S.*, 350 U.S. 179?

SUMMARY OF ARGUMENT.

Section 235(a), (8 U.S.C. § 1225(a)), clearly gives Immigration officers the power to question under oath any person concerning the privilege of any alien or person the Immigration officer believes or suspects to be an alien concerning his privilege to reside in the United States. In view of this clear power set forth in § 235(a), it is also clear that § 235(a) provides the means of requiring testimony from these persons by administrative subpoena and/or Court order, if necessary.

ARGUMENT.

Appellant contends that *Minker v. U. S.*, 350 U.S. 179, governs the factual situation herein and consequently the Appellant may not be forced to give testimony where he may be the subject of an investigation. The *Minker* case, *supra,* dealt exclusively with the power of Immigration officers to subpoena naturalized citizens and to force them to give evidence which could be used for possible denaturalization proceedings. The Supreme Court held that § 235(a) was not definite enough in view of the possible consequences of this type of coerced testimony to allow the use of the administrative subpoena power to elicit evidence from a naturalized citizen concerning his own de-

naturalization. The facts of this case are entirely dissimilar. As is usual, there is a conflict of testimony or evidence in this case as to the Appellant's status. The Appellee testified that he suspected the Appellant to be an alien (R. 31), and although the Appellant refused to answer questions put to him by the Appellee on May 7, 1958 concerning his place of birth, and date of birth, and nationality (R. 25), and how he first came to the United States (R. 25), and whether he was born in Sin Chin Village in China (R. 26), he has now filed with the Court attached in an affidavit form to his motion to quash the following facts: that he was born in Honolulu on April 4, 1894; that he returned to China when he was five years old; that on December 10, 1922 he returned to Hawaii and was admitted as a native born citizen (R. 5). From these facts, he claims that he is a naturalized American citizen by collective naturalization (R. 5). It may easily be seen from perusal of the questions set forth in Plaintiff's Exhibit I (R. 23-28) that the issue involved is one of identity. For example, is the Appellant the same person who left Hawaii when he was five years old? This question since there is no record of birth can only be resolved by a full and free disclosure by the Appellant of the answers to the questions put to him by the Appellee. In this regard, as the questions are reasonable and reasonably aimed at eliciting the information desired, the Courts will not interfere with the method of questioning used by the Immigration officer. *Kaneda v. U. S.,* 9 Cir. 1922, 278 F. 694, cert. den. 259 U.S. 583, 42 S.Ct. 586.

Section 235(a), Immigration and Nationality Act, provides in part as follows: ". . . any Immigration officer . . . shall have power to administer oaths and to take and consider evidence *of or from* any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States . . . any Immigration officer . . . shall have power to require by subpoena the attendance and testimony of witnesses before Immigration officers . . . and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States . . . and to that end may invoke the aid of any Court of the United States. . . ." (Emphasis supplied.)

It is drawn to the attention of the Court that here the Appellee was attempting to take and consider evidence of and from a person touching on the privilege of a person suspected to be an alien to reside in the United States. It would seem as differentiated from the *Minker* case, *supra,* that here the Immigration officer's authority is clearly spelled out in the section itself, and to say under the facts herein presented that the Appellant would not be considered a witness, strains the plain meaning of the statute and obvious intent of Congress.

Section 235(a) is a reenactment of Section 16, Immigration Act of 1917 (39 Stat. 885, 8 U.S.C. 1946 Ed. 152). There are certain changes which are not pertinent here and unless something clearly to the contrary

appears the former interpretation of the statute should apply.

In connection with the construction of § 235(a), it is to be noted that the predecessor section, § 16, Immigration Act of 1917 (39 Stat. 885, 8 U.S.C. 1946 Ed. 152), was held to allow the subpoena power to be used against aliens in either deportation or exclusion proceedings, i.e., the alien himself was subpoenaed and was compelled to testify. *Graham v. U. S.,* 9 Cir. 1938, 99 F. (2d) 746; *Loufakis v. U. S.,* 3 Cir. 1936, 81 F. (2d) 966.

It is contended that the comparisons made in *Minker v. U. S., supra,* at page 189, footnotes 9, 10, and 11, are inapposite herein in view of the fact that there can be no differentiation made between the person questioned and "the alien" until after the questions are asked since no formal administrative proceeding would have been instituted prior to the questioning under § 235(a).

As regards Appellant's belated statement in affidavit form concerning a few of the facts with reference to his birth, it is suggested to this Court that the issue involved in this investigation is one of identity and that administrative decisions are not *res judicata* of citizenship. *Wong Chow Gin v. Cahill,* 79 F. (2d) 854; *Lum Mon Sing v. U. S.*, 9 Cir., 124 F. (2d) 21; *Flynn v. Ward,* 1 Cir. 1938, 95 F. (2d) 742; *Mock Kee Song v. Cahill,* 9 Cir. 1938, 94 F. (2d) 975; *Mah Toi v. Brownell,* 9 Cir. 1955, 219 F. (2d) 642, cert. den. 350 U.S. 823, 76 S.Ct. 49.

CONCLUSION.

It is submitted that the Appellee had clear statutory authority to do what he did. The order appealed from should be affirmed.

Dated, Honolulu, T. H.,
August 25, 1958.

Respectfully submitted,

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